Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE: GENE SCROGGY, WARDEN
OF THE KENTUCKY STATE
PENITENTIARY, EDDYVILLE, KENTUCKY

AND

CHRIS GORMAN, ATTORNEY GENERAL
OF THE COMMONWEALTH OF KENTUCKY PETITIONERS

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

WHETHER A WRIT OF MANDAMUS SHOULD ISSUE TO THE UNITED STATES COURT OF APPEALS IN A DEATH PENALTY HABEAS CORPUS PROCEEDING TO COMPEL THAT COURT TO RULE ON MOTIONS FILED BY BOTH PARTIES THAT HAVE BEEN PENDING IN THAT COURT FOR OVER TWO YEARS.

PARTY-RESPONDENTS

JUDGES FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT: SETTING AS A UNITED STATES COURT OF APPEALS

Eugene William Gall, Jr., Adverse party in United States Court of Appeals for the Sixth Circuit.

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(Pursuant to Supreme Court Rule 14(K)
the APPENDIX is contained in a Separate Volume)

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IN THE
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OCTOBER TERM, 1993

IN RE: GENE SCROGGY, WARDEN
OF THE KENTUCKY STATE
PENITENTIARY, EDDYVILLE, KY.,

AND

CHRIS GORMAN, ATTORNEY GENERAL
OF THE COMMONWEALTH OF KY. PETITIONERS

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Attorney General of the Commonwealth of Kentucky, hereby respectfully petitions the Court on behalf of Gene Scroggy, Warden of the Kentucky State Penitentiary, Eddyville, Kentucky, (Commonwealth hereafter) pursuant to Title 28 U.S.C. §1651(a), the All Writs Act, for Writ of Mandamus, to be issued pertaining to Eugene William Gall, Jr. versus Gene Scroggy, Warden, Sixth Circuit No. 91-5502, to compel the United States Court of Appeals for the Sixth

Circuit to rule upon Motion to Reissue Briefing Schedule in that case and to rule upon Motion to Enlarge the Record on Appeal and Remand to District Court. Gall's Motion to Remand to District Court and to Enlarge the Record on Appeal has been pending since on or about October 25, 1991. The Commonwealth's Motion to Reissue a Briefing Schedule has been pending since on or about July 9, 1992. The Commonwealth's Renewed Motion to Reissue Briefing Schedule was filed on or about June 4, 1993. The Commonwealth's second renewed Motion to Reissue Briefing Schedule was filed on or about October 8, 1993. The Clerk of the Sixth Circuit Court of Appeals has informed counsel for the Commonwealth that policy of the Sixth Circuit prohibits identifying the judges on the panel to which the aforesaid motions were assigned. Consequently, the Commonwealth has filed this petition against all current regular judges of the Sixth Circuit en banc.

OPINIONS BELOW

The opinions of the Kentucky Supreme Court upholding Gall's convictions and death sentence are reported. Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980), cert. denied, 450 U.S. 989 (1981); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010 (1986). The opinion and order of the United States District Court for the Eastern District of Kentucky dismissing Gall's petition for writ of habeas corpus is not reported and was issued on January 23, 1991, Civil Action No. 87-56. (Appendix Pages 1-56). The second opinion for the United States District Court for the Eastern District of Kentucky denying Gall's motion to alter or amend its judgment of January 23, 1991, is not reported (March 19, 1991). (Appendix Pages 57-61).

JURISDICTION

The Commonwealth asks this Court to compel the United States Court of Appeals for the Sixth Circuit to rule upon Gall's motion to enlarge the record on appeal and to remand to District

Court, which has been pending since on or about October 25, 1991, and further to rule upon the Commonwealth's Motion to Reissue Briefing Schedule which has been pending in that Court since on or about July 9, 1992. Consequently, there is no judgment of the Sixth Circuit for review by this Court. The Commonwealth invokes the jurisdiction of this Court pursuant to Title 28 United States Code §1651(a), the All Writs Act, for Writ of Mandamus. Jurisdiction of the United States District Court was invoked pursuant to Title 28 U.S.C. §2254, the Habeas Corpus Act. This Court has jurisdiction over any decision of the Sixth Circuit Court of Appeals in Gall v. Scroggy pursuant to Title 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §1651(a) states:

> The Supreme Court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The facts pertaining to Gall's convictions and death sentence are set forth in the Kentucky Supreme Court's opinion. Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980), cert. denied, 450 U.S. 989 (1981). In 1978, Gall was convicted of murdering and raping 12-year-old Lisa Jansen. Gall at 100-103.

On July 15, 1986, Gall filed a Petition for Writ of Habeas Corpus in the United States Court of Appeals for the Western District of Kentucky. On July 18, 1986, the District Court granted Gall's motion for stay of execution of his death sentence. On April 2, 1987, the proceeding was transferred to the United States District Court for the Eastern District of Kentucky. On January 23, 1991, the United States District Court issued Judgment, Opinion and Order, dismissing Gall's petition for writ of habeas corpus. On March 19, 1991, the United States District Court issued an opinion and order denying Gall's motion to alter or amend the judgment issued on January 23, 1991. On

April 18, 1991, Gall filed a Notice of Appeal and application for certificate of probable cause. On April 23, 1991, the District Court granted the certificate for probable cause. On June 10, 1991, the District Court granted Gall's motion directing the court reporter to prepare transcripts pertaining to the Federal evidentiary hearings held on February 12, 1988 and March 13, 1989 and May 9, 1988, at the expense of the United States Government. On June 18, 1991 and July 3, 1991, the transcripts of the aforesaid hearings were filed in the Record of the District Court. On August 27, 1991, the Clerk of the Sixth Circuit of the United States Court of Appeals issued a briefing schedule. (Gall's brief was due to be filed on October 29, 1991.) On October 15, 1991, fourteen (14) days before his brief was due, Gall filed a motion to enlarge the record on appeal and for remand to the United States District Court. On October 22, 1991, Gall filed a motion for extension of time to file his brief in the Court of Appeals to and including

February 26, 1992. On or about October 25, 1991, the Commonwealth filed a response to Gall's motion to enlarge the record on appeal and remand to District Court.

On or about July 8, 1992, the Commonwealth filed a motion to reissue briefing schedule and motion for leave to supplement its previous response to Gall's motion to enlarge the record on appeal and remand to district court. The motion to supplement was supported by cases decided by this Court, the Kentucky Supreme Court, and the United States Courts of Appeal in death penalty cases published subsequent to the Commonwealth's original response. On or about June 4, 1993, the Commonwealth filed a motion to renew its motion to reissue briefing schedule. On or about October 9, 1993, the Commonwealth filed a second motion to renew its motion to reissue briefing schedule in the Sixth Circuit.

As of this date, the Sixth Circuit Court of Appeals has not ruled upon any of the foregoing motions nor provided any indication as to when, if ever, it will rule on those motions.

REASONS FOR GRANTING THE WRIT

Pursuant to 28 U.S.C. §1651 (a) and United States Supreme Court Rule 20.1, petitioners Scroggy and Gorman now respectfully request this court to issue a Writ of Mandamus directing the United States Court of Appeals for the Sixth Circuit, all current regular judges of the Sixth Circuit en banc, to rule upon Gall's motion to enlarge the record on appeal and to remand to the District Court and rule upon the Commonwealth's Motion to Reissue Briefing Schedule. The writ should issue in this case because the Commonwealth can clearly and indisputably demonstrate that: (1) Mandamus will protect this court's prospective appellate (certiorari) jurisdiction over the Sixth Circuit and (2) the Commonwealth cannot obtain adequate relief elsewhere.

The Supreme Court may issue Writs of Mandamus to inferior courts pursuant to 28 U.S.C. §1651, the All Writs Act. Although United States Supreme Court Rule 20.1 cautions that issuance of a writ is a matter of

discretion sparingly exercised, the writ may be issued in the aid of this Court's appellate jurisdiction which might otherwise be defeated. Marbury v. Madison, 1 Cranch 137 (1803); Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943); FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966). Mandamus is appropriate both to confine an inferior court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to do so. Roche, 319 U.S. at 26; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978). Moreover, mandamus may be issued only when the party requesting the writ has no other adequate remedy. Kerr v. United States Dist. Ct. for N. Dist. of Cal., 426 U.S. 394 at 403 (1976). It may not be used as a substitute for appeal. Id.

The petitioners meet the criteria for issuance of a Writ of Mandamus to the Sixth Circuit. The failure of the Sixth Circuit in its duty to decide the pending motions is exceptional and merits relief. This court

offers the only available forum for redress of the inaction by the Sixth Circuit.

The delay in ruling upon the motions pending before the Sixth Circuit has now exceeded two (2) years and the failure to rule upon the aforementioned motions is inexplicable. This Court's opinion In Re: Blodgett, 112 S.Ct. 674 at 676, 116 L.Ed.2d 669 at 674-675 (1992), specifically sets forth the policy pertaining to death penalty cases established by this Court:

> In a capital case the grant of a stay of execution directed to a State by federal court imposes on that court that concomitent duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all issues presented in the case.

Also see Rust v. Clarke, 960 F.2d 72 at 73 (8th Cir. 1992), pointing out the duty of federal courts to give priority to capital habeas cases, citing Delo v. Stokes, 495 U.S. 320 (1990).

Exceptional circumstances exist for granting the writ. On August 27, 1991, the clerk of the Sixth Circuit of the United States Court of

Appeals issued a briefing schedule. Based on that schedule, Gall's brief was due to be filed on October 29, 1991. On October 15, 1991, fourteen (14) days before his brief was due, Gall filed a Motion to Enlarge the Record on Appeal and for remand to the United States District Court. On October 22, 1991, seven (7) days before his brief was due, Gall filed a Motion for Extension of Time to file his brief in the Court of Appeals to and including February 26, 1992. The Commonwealth filed a timely response to the motion for enlargement and remand. To date, the Motion to Enlarge the Record on Appeal and for remand as well as the Motion for Extension of Time have never been ruled upon by the Sixth Circuit.

On or about July 8, 1992, the Commonwealth filed a Motion to Reissue Briefing Schedule. Gall did not respond to this motion. On October 9, 1993, the Commonwealth filed a second motion to renew its Motion to Reissue Briefing Schedule in the Sixth Circuit. After this second renewal motion or third motion requesting reissuance of

the briefing schedule Gall responded in the Sixth Circuit. The present posture of the case is dormant, despite urgings by the Commonwealth to advance the appeal. There is no indication which would lead the parties in this case to believe that the motions will be decided, a briefing schedule issued, or that the case will ever be finalized. "Our Federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." McCleskey v. Zant, 499 U.S. 467 at 491 (1991). Consequently, the Commonwealth will be unable to carry out the sentence imposed by jury. This case has been in constant litigation since 1978 and it should be resolved without further delay.

The Commonwealth has no recourse other than to petition this Court in order to compel the Sixth Circuit to carry out its duty to expeditiously decide this case. The Sixth Circuit's delay ruling upon the pending motions

and setting a briefing schedule in this case is unjustified.

CONCLUSION

For the foregoing reasons, the Attorney General for the Commonwealth of Kentucky requests respectfully that this Court issue a writ of mandamus to the United States Court of Appeals for the Sixth Circuit and direct it to rule upon the aforesaid motions pending before that Court.

Respectfully submitted,

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